

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JERRY CRICKON,

Petitioner,

Civil No. 07-1180-HA

v.

OPINION AND ORDER

CHARLES DANIELS, Warden,
Federal Correctional Institution,
Sheridan, Oregon,

Respondent.

HAGGERTY, Chief Judge:

On August 9, 2007, petitioner filed a petition for a writ of habeas corpus [1] pursuant to 28 U.S.C. § 2241. He invokes this court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(4). Petitioner is a federal prisoner incarcerated by the Bureau of Prisons (BOP) at the Federal Prison Camp in Sheridan, Oregon (FPC-Sheridan).

Petitioner alleges that the BOP wrongfully declared him ineligible for a discretionary sentence reduction upon completion of the BOP's Drug and Alcohol Treatment Program (DAP). In its Response to Habeas Petition [6], which this court construes as a motion for dismissal, respondent argues that the petition should be denied on grounds that petitioner was properly found ineligible for any sentence reduction.

BACKGROUND

Petitioner was convicted in the Northern District of Illinois in July, 2000, for Conspiracy to Possess with Intent to Distribute Methamphetamine in violation of 21 U.S.C. § 846.

Petitioner received a total guideline sentence of 151 months.

Congress has directed the BOP to provide substance abuse treatment to prisoners who have a "treatable condition of substance addiction or abuse." 18 U.S.C. § 3621(b). As an incentive for prisoners to seek treatment, sentence reductions are available to some prisoners who completed the substance abuse treatment programs. 18 § 3621(e)(2)(B). Congress mandated that only nonviolent offenders are eligible for a sentence reduction, and that the sentence reduction may not exceed one year. *Id.*

There is no dispute that petitioner has been found eligible to participate in DAP and is likely to have the opportunity to complete at least the first phase of DAP, a 500-hour residential treatment program before his projected good-time release date of February 9, 2010. However, the BOP's determination that petitioner is ineligible for a sentence reduction is proper.

To implement § 3621, the BOP promulgated regulation 28 C.F.R. § 550.58 and Program Statement 5162.04, which set forth the eligibility for the early-release incentive. Section 550.58 provides in relevant part:

(a) Additional early release criteria.

(1) As an exercise of the discretion vested in the Director of the Federal Bureau of Prisons, the following categories of inmates are not eligible for early release:

* * *

(iv) Inmates who have a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, or aggravated assault, or child sexual abuse offenses;

Similarly, Section 6.1.1 of Program Statement 5330.10, entitled "EARLY RELEASE QUALIFICATIONS," denies eligibility for early release to those inmates who have a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, or aggravated assault, or child sexual abuse offenses. Section 6.1.1(a)(1)(iv); *see also Sisneros v. Anderson*, 2007 WL 3512647, at *1 (D. Minn. November 14, 2007) (quoting BOP Program Statement 5330.10).

"There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 7 (1979). The BOP enjoys "broad discretion to deny sentence reductions," even to inmates who successfully complete the first stages of DAP. *Rublee v. Fleming*, 160 F.3d 213, 216 (5th Cir. 1998). While the BOP is vested with broad discretionary authority under 18 U.S.C. § 3621(e) to reduce the sentence of a prisoner convicted of a nonviolent offense, that section does not create a due process liberty interest in the sentence reduction. *See Jacks v. Crabtree*, 114 F.3d 983, 986 n.4 (9th Cir. 1997) (denial of sentence reduction merely means that the inmate will have to serve out his or her sentence as expected).

However, prisoners are entitled to judicial review of whether the BOP's regulations or their applications were arbitrary and capricious or otherwise an abuse of discretion . *See Rublee*, 160 F.3d at 215-16; *see also Lopez v. Davis*, 531 U.S. 230, 240 (2001).

Therefore, in cases in which the BOP has made a determination about a prisoner's entitlement to a DAP sentence reduction, the court "must uphold the BOP's action unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Joseph v. Boldt*, 2007 WL 1101257, at *3 (D. Or., April 11, 2007) (quoting 5 U.S.C. § 706(2)(a) and citing *Pac. Coast Fed'n of Fishermen's Ass'ns. v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005)). The BOP need only articulate a rational connection between the facts found and the conclusions reached, and its internal agency guidelines are entitled to some deference. *Id.*

Petitioner was found ineligible for a sentence reduction that is otherwise authorized by 18 U.S.C. § 3621(e)(B)(2) because he has a prior conviction for Voluntary Manslaughter. Resp. at 3. There is no meaningful dispute presented challenging whether this conviction is a violent offense that, under applicable Program Statements, excludes petitioner from entitlement to a sentence reduction under DAP.

As noted above, there is no constitutionally protected right of a convicted person to early release under § 3621(e). A petitioner who has been denied a sentence reduction pursuant to § 3621 is not entitled to habeas relief unless the petitioner's crime was improperly categorized, or the BOP's regulations implementing § 3621's requirements are applied retroactively to a petitioner who entered a drug treatment program in reliance on the prior regulations. *See, e.g. Dowling v. Crabtree*, 58 F. Supp. 2d 1172, 1173 (D. Or. 1999).

As a federal court eloquently stated in the context of a similar case, even if Petitioner had been "eligible" for early release notwithstanding his prior convictions for robbery and his current conviction for being a felon in possession of a firearm, "eligibility is not entitlement." *LaSorsa v. Spears*, 2 F. Supp.2d 550, 554 (S.D.N.Y. 1998), quoting *Bush v. Pitzer*, 133 F.3d 455, 457 (7th Cir. 1997).

Walton v. Booker, 2006 WL 2374843, at *3 (D. Ariz. August 16, 2006).

The request by petitioner for this court to implement a "staleness" or "statute of limitations" component to the BOP's consideration of pre-conviction conduct when determining sentence reduction eligibility is rejected. Although petitioner's conviction for voluntary manslaughter occurred almost thirty-eight years ago, the BOP's determination that petitioner is disqualified from the early release incentive available under 18 U.S.C. § 3621(e)(b)(2) because of this conduct was neither arbitrary nor capricious. *See Sisneros*, 2007 WL 3512647, at *1 (quoting BOP Program Statement 5330.10).

CONCLUSION

This court concludes that the BOP properly determined that petitioner was ineligible for a discretionary sentence reduction under 18 U.S.C. § 3621(e)(2)(B). Petitioner's petition for a writ of habeas corpus [1] is DENIED; the Response to Habeas Petition [6], which this court construes as a motion for dismissal, is GRANTED.

IT IS SO ORDERED.

DATED this 18 day of December, 2007.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge